

BRB No. 01-0801

RONALD L. JACOBSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MARINE TERMINALS CORPORATION	)	DATE ISSUED: <u>June 19, 2002</u>
	)	
and	)	
	)	
MAJESTIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Compensation Order - Approval of Attorney Fee of Karen P. Staats, District Director, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Compensation Order - Approval of Attorney Fee (Case Nos. 14-117567, 14-121224) of District Director Karen P. Staats rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, a general class B longshoreman who obtained work off employer's casual board, injured his neck in 1994 and his neck, left upper limb, low back, left buttock, and left posterior thigh in 1996 at work. Additionally, claimant developed a psychological injury associated with the pain suffered from these work injuries. The administrative law judge awarded claimant various periods of temporary total and partial disability and permanent partial disability benefits, as well as medical benefits for his work injuries.

Claimant's counsel subsequently submitted a fee petition to the district director,

requesting an attorney's fee of \$9,981.25, representing 47.25 hours of attorney services performed at \$200 per hour and 6.25 hours of legal assistant time at \$85 per hour. Employer objected to claimant's counsel's fee request. Claimant's counsel additionally requested \$350, representing 1.75 hours at \$200 per hour for time spent responding to employer's objections. The district director awarded claimant's counsel the sum of \$9,868.75, representing 18.5 hours at \$175 per hour for attorney services performed in 1995 and 1996, 30.5 hours at \$200 per hour for attorney services performed in 1998-2001, and 6.25 hours of legal assistant time at \$85 per hour.

On appeal, claimant's counsel solely challenges the district director's award of \$175 per hour for the 18.5 hours of attorney services performed in 1995 and 1996. Employer has not responded to this appeal.

Claimant's counsel contends that the district director erred in awarding him his historical rate of \$175 per hour for services performed in 1995 and 1996 in accordance with the holding in *Hobbs v. Director, OWCP*, 820 F.2d 1528 (9<sup>th</sup> Cir. 1987), when he requested his current rate of \$200 for all services to compensate for the delay in payment. The Board has held that enhancement for delay in payment is appropriate for fees awarded under Section 28 of the Act, 33 U.S.C. §928. *See Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995). Both the Board and the United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, have held that when enhancement for delay in payment of an attorney's fee is timely raised, the administrative body awarding the fee must address the appropriateness of augmenting the fee award for delay in payment. *See Johnson v. Director, OWCP*, 183 F.3d 1169, 33 BRBS 112(CRT) (9<sup>th</sup> Cir. 1999); *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9<sup>th</sup> Cir. 1996); *Allen v. Bludworth Bond Shipyard*, 31 BRBS 93 (1997).

In the instant case, the district director awarded claimant's counsel \$175 per hour for services performed in 1995 and 1996, relying in part on the holding in *Hobbs*, 820 F.2d 1528, that the hourly rate in effect at the time services were rendered should be awarded. The district director also awarded the hourly rate of \$175 for the 1995 and 1996 hours because she had awarded that hourly rate to claimant's prior counsel for his 1995 hours and felt compelled to award the same amount to claimant's present counsel. Although the holding in *Hobbs*, 820 F.2d 1528, has been superseded by *Anderson*, 91 F.3d 1322, 30 BRBS 67(CRT),<sup>1</sup> claimant has not shown that the district director abused her discretion in awarding claimant's counsel \$175 per hour for the 1995 and 1996 hours. *See generally Story v. Navy Exch. Serv. Ctr.*, 33 BRBS 111 (1999).

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<sup>1</sup>In *Anderson*, 91 F.3d at 1324, 30 BRBS at 68(CRT), the Ninth Circuit stated, "our decision in *Hobbs* regarding the availability of delay awards is no longer good law in this circuit."

Specifically, claimant's counsel concedes on appeal that \$175 is his historical rate. However, he did not request from the district director an enhancement for the delay in payment of a fee, in either his fee petition or his response to employer's objections. In his fee request before the district director, claimant's counsel asserted that his current rate was \$225 per hour, stating in relevant part,

My hourly rate for legal services on cases of this type is \$225 per hour at the present time. I feel this rate is reasonable and customary on claims of this type for someone of my experience and training in the Portland, Oregon community. Because I could have filed this affidavit earlier and was waiting for this claim to conclude, I am requesting only \$200 per hour for my time for these services.

Clt. Affidavit of Attorney Fees at 5. In counsel's response to employer's objections to his hourly rate, he merely pointed out that 1994 Oregon state bar surveys are not applicable to 1998 and 1999 fees, that the Board has consistently awarded \$200 per hour for services performed before it since 1998, and that in 2000, one administrative law judge in Portland had awarded \$200 per hour, recognizing it as the prevailing rate. Clt. Response to Carrier's Attorney Fee Objection at 1-2. Enhancement for delay need not be awarded unless it is requested of the administrative body awarding the fee. *See Johnson*, 183 F.3d 1169, 33 BRBS 112(CRT); *Anderson*, 91 F.3d 1322, 30 BRBS 67(CRT); *Nelson*, 29 BRBS 90. As claimant's counsel did not request enhancement, the district director did not err in using counsel's historic hourly rate. Consequently, we affirm the district director's fee award.

Accordingly, the Compensation Order of the district director is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge